

No. PD-0848-20

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/4/2021
DEANA WILLIAMSON, CLERK

STOYAN K. ANASTASSOV,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Dallas County
No. 05-19-00397-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- * The parties to the trial court's judgment are the State of Texas and Appellant, Stoyan K. Anastassov.
- * The trial judge was the Honorable Brandon Birmingham, 292nd Judicial District Court, Dallas County.
- * Counsel for the State at trial were Marissa Mouton and Brandie Wade, 133 LB 19 Frank Crowley Courts Building, N. Riverfront Blvd., Dallas, Texas 75207.
- * Counsel for the State on appeal was Kimberly Duncan, 133 LB 19 Frank Crowley Courts Building, N. Riverfront Blvd., Dallas, Texas 75207.
- * Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.
- * Counsel for Appellant at trial were Ashkan Mehryari, 212 West Spring Valley Road, Richardson, Texas 75081, and Tom Pappas, 900 Jackson Street, Suite 330, Dallas, Texas 75202.
- * Counsel for Appellant on appeal was Michael Mowla, P.O. Box 868, Cedar Hill, Texas 75106.
- * Counsel for Appellant before the Court of Criminal Appeals is Michael Mowla, P.O. Box 868, Cedar Hill, Texas 75106.

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No. PD-0848-20

TO THE COURT OF CRIMINAL APPEALS
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v.

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Appeal from Dallas County
No. 05-19-00397-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A sentence may include a fine. When a court orders sentences resulting from a same-criminal-episode prosecution under TEX. PENAL CODE § 3.03 to run concurrently, that includes the discharge of any fines assessed for each offense. For purposes of an offender's obligation to pay, concurrent multiple fines are to be treated as a unitary fine so that they equally discharge together. Both remain a to-be-

discharged-jointly obligation when no payment has been made.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

STATEMENT OF THE CASE

Appellant was convicted twice in the same jury trial of indecency with a child by contact for offenses committed in 2013. F15-50349-V 1 CR 270-71; F15-50350-V 1 CR 272-73. A jury sentenced Appellant to nine years' imprisonment on one count and three years' on the other. F15-50349-V 1 CR 270-71 (9 years); F15-50350-V 1 CR 272-73 (3 years). The jury also imposed a \$10,000 fine in each case. F15-50349-V 1 CR 270-71; F15-50350-V 1 CR 272-73. The trial court ordered the sentences to run concurrently. F15-50349-V 1 CR 270-71; F15-50350-V 1 CR 272-73. Observing this to be the case, the court of appeals struck one \$10,000 fine (Case No. F15-50350-V) because "the trial court could not assess multiple fines." *Anastassov v. State*, No. 05-19-00397-CR, 2020 WL 4669880, at *10-11 (Tex. App.—Dallas Aug. 12, 2020) (not designated for publication). It affirmed the judgment as modified. *Id.*

ISSUE PRESENTED

Should concurrent fines be discharged concurrently like concurrent terms of confinement?

SUMMARY OF THE ARGUMENT

Concurrent terms of confinement are served at the same time. Concurrent fines also discharge in tandem when imposed under TEX. PENAL CODE § 3.03. Therefore, the lower court erred to view the two concurrent fines as being impermissible and then striking the second lawfully imposed fine from the judgment in Case No. F15-50350-V.

ARGUMENT

As with confinement, fines are punitive and are considered to be part of an offender's sentence. *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011) ("Fines are punitive, and they are intended to be part of the convicted defendant's sentence as they are imposed pursuant to Chapter 12 of the Texas Penal Code, which is entitled 'Punishments.'"); *see also Rhodes v. State*, 240 S.W.3d 882, 888 (Tex. Crim. App. 2007) (judgment can contain two or more sentencing elements like imprisonment and a fine). Concurrent sentencing¹ in a same-criminal-episode

¹ Concurrent sentencing for same-criminal-episode prosecutions is generally the default. *See* TEX. PENAL CODE § 3.03(a) ("When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently."); *Ex parte Reynolds*, 462 S.W.2d 605, 606 n.1 (Tex. Crim. App. 1970) ("[w]here the court does not order that two or more sentences in different prosecutions shall be cumulative as permitted by Article 42.08 . . . , the terms of imprisonment automatically run concurrently."). *But see e.g.*, TEX. PENAL CODE §

prosecution under TEX. PENAL CODE § 3.03 applies to terms of confinement² and fines. *State v. Crook*, 248 S.W.3d 172, 176-77 (Tex. Crim. App. 2008); *see also Ex parte Madding*, 70 S.W.3d 131, 136 (Tex. Crim. App. 2002) (concurrent or consecutive sentencing must be announced in open court to satisfy due process). In operation, concurrent sentences discharge at the same time. *Nguyen v. State*, 359 S.W.3d 636, 643 (Tex. Crim. App. 2012). When applied to fines, this means that they discharge together (or jointly, as Appellant states³) as a singular or unitary fine, with

3.03(b) (authorizing concurrent or consecutive sentences for specified offenses); TEX. CODE CRIM. PROC. art. 42.08(b) (mandatory stacking for non-state-jail felony offenses committed while the offender was an inmate in the TDCJ); TEX. HEALTH & SAFETY CODE § 481.134(h) (mandatory drug-free-zone stacking provision construed in *Moore v. State*, 371 S.W.3d 221, 228-29 (Tex. Crim. App. 2012)).

Concurrent sentencing is not the default in non-same-criminal-episode prosecution. TEX. CODE CRIM. PROC. art. 42.08(a) (“Except as provided by Subsections (b) and (c), in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases, and sentence and execution shall be accordingly”).

² Concurrent sentences of imprisonment begin to run on the day the sentences are pronounced. TEX. CODE CRIM. PROC. art. 42.09(1). Therefore, a cumulation order cannot be imposed after a sentence has been pronounced in open court. *Moore*, 371 S.W.3d at 228.

³ Appellant’s Response to the Petition for Discretionary Review filed by the State Prosecuting Attorney, at 6, *available at* <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=32f563ec-7f10-4>

the greatest amount imposed controlling when multiple fine amounts differ. *See Crook*, 248 S.W.3d at 175-76 (noting that then-criminal-defense attorney Maloney, J., testified before a senate subcommittee that “all sentences in convictions obtained under Section 3.03(a) would run concurrently with the defendant being required to serve the harshest one imposed.”).

In this case, a jury convicted Appellant of two second-degree-felony offenses of indecency-by-contact. TEX. PENAL CODE § 21.11(a)(1), (d).⁴ The second-degree-felony punishment range included a term of imprisonment up to twenty years but not less than two and, in addition to imprisonment, though not mandatory, a fine not to

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Appellant suggested that this Court should clarify whether the jury should be instructed about the application of concurrent sentencing to fines, but this case does not raise the issue. However, this Court has held that it is not erroneous for a trial court to correctly instruct a jury that sentences on both charges will run concurrently under TEX. PENAL CODE § 3.03. *Haliburton v. State*, 578 S.W.2d 726, 728-29 (Tex. Crim. App. 1979). It is unclear how this would apply in cases (like this) in which stacking is discretionary.

⁴ Subsection (d) was added in 2001, Acts 2001, 77th Leg., ch. 739 (S.B. 932), § 2, eff. Sept. 1, 2001, to replace subsection (c) which, in 1993, carried the same applicable punishment. Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § 1.01, eff. Sept. 1, 1994.

exceed \$10,000. TEX. PENAL CODE § 12.33.⁵ Each offense of conviction is subject to its specific applicable range of punishment. Contrary to the lower court’s statement that multiple fines are improper,⁶ multiple fines are indeed proper. Like the two terms of imprisonment, the \$10,000 fine for each of Appellant’s convictions was authorized by statute. And both judgments plainly state that the sentence in each case shall run “CONCURRENT.”⁷ F15-50349-V 1 CR 270; F15-50350-V 1 CR 272.

Appellant’s two sentences—imprisonment terms and fines—were properly imposed and therefore must be enforced. The concurrent designation only effects how they will actually be served by Appellant. Appellant will discharge his imprisonment terms⁸ together by receiving time credit for both convictions at the

⁵ Last amended in 2009. Acts 2009, 81st Leg., ch. 87 (S.B. 1969), § 25.147, eff. Sept. 1, 2009.

⁶ *Anastassov*, 2020 WL 4669880, at *11 (“the trial court could not assess multiple fines.”).

⁷ The judge could have stacked the sentences because Appellant’s victim was younger than 17. F15-50349-V 1 CR 11 (indictment alleging victim under 17); F15-50350-V 1 CR 12, 230 (indictment alleging victim under 17); TEX. PENAL CODE § 3.03(b)(2)(A) (including offense under Section 21.11 for discretionary stacking); Acts 1997, 75th Leg., ch. 667 (S.B. 381), § 2, eff. Sept. 1, 1997 (adding 21.11 to Section 3.03(b)(2)(a)).

⁸ Term of confinement for two or more concurrent terms is calculated by using the longest term imposed by the convicting court. TEX. GOV’T CODE § 498.001(2)(C), *last amended* by Acts 1997, 75th Leg., ch. 165 (S.B. 898), § 12.10, eff. Sept. 1, 1997.

same time while he remains in the custody of the TDCJ.⁹ Likewise, the fines will discharge at the same time; any amount paid will be applied towards the discharge of both fines equally. So for Appellant's obligation to discharge each, the two \$10,000 fines will, for accounting purposes, be treated as a single \$10,000 fine so that only \$10,000 in total is ever due and collected by the State.

Following the law is not just a technicality that yields no practical difference in application. The striking of one properly assessed fine has a substantive consequence, even if, in both scenarios, the actual outcome may be the same in that the total amount collected will never exceed \$10,000. If the striking order here were upheld and Appellant's conviction in the other case were later vacated, Appellant would receive the undeserved windfall of being relieved of any punitive fine in Case

⁹ Appellant is not eligible for mandatory supervision. TEX. GOV'T CODE § 508.149(a)(5) (inmate serving a sentence for an offense under Section 21.11 is not eligible for mandatory supervision); Acts 1999, 76th Leg., ch. 62 (S.B. 1368), § 10.22, eff. Sept. 1, 1999 (adding Section 21.11 as an ineligible offense).

Appellant is eligible for parole when his flat time equals half of the sentence or 30 calendar years, whichever is less; he is not eligible in a period less than 2 calendar years. TEX. GOV'T CODE § 508.145(d)(1)(A), (d)(2) (relating to parole eligibility for Section 21.11 offenses); Acts 1997, 75th Leg., ch. 165 (S.B. 898), § 12.10, eff. Sept. 1, 1997 (adding Section 21.11(a) to require flat-time discharge of half or 30 years before parole eligibility); *see also* TEX. CODE CRIM. PROC. art. 42.12 § 3g(a)(C) (excluding Section 21.11(a)(1) from eligibility for judge-ordered community supervision).

No. F15-50350-V. Any assertion by Appellant that there is “**no possibility**”¹⁰ that only one of the convictions could be set aside is wrong. For example, if supported by newly discovered evidence of innocence, Appellant could be granted habeas relief in one case since the offenses involved different conduct committed on different dates.¹¹ That the possibility of this is slight or even non-existent doesn’t really matter. The point is that sentencing laws should be applied correctly and uniformly.

Finally, the court of appeals may have incorrectly applied TEX. CODE CRIM. PROC. art. 102.073(a) to fines. *Anastassov*, 2020 WL 4669880, at *11 (“the trial court could not assess multiple fines or duplicate court costs in the two judgments.”). TEX. CODE CRIM. PROC. art. 102.073(a) states: “In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each *court cost or fee* only once against the defendant.” (emphasis added). Fines, restitution, fees, and costs all have a technical meaning. *See Weir v. State*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009) (court costs are non-punitive, unlike fines and restitution); *Armstrong*, 340 S.W.3d at 767 (attorneys fees

¹⁰ Appellant’s Response to the Petition for Discretionary Review filed by the State Prosecuting Attorney, at 7 (emphasis in original).

¹¹ F15-50349-V 1 CR 11 (indictment alleging contact of genitals of S.S. committed in December 2013), 270 (judgment with offense date); F15-50350-V 1 CR 12, 230 (indictment alleging contact of breast of S.S. committed in December 2011), 272 (judgment with offense date).

are like court costs because they are compensatory). And fines are not non-punitive costs or fees, so the lower court erred to categorize them as such. Preventing multiple bills for recoupment costs and fees in a same-criminal-episode prosecution makes sense because the costs and fees are associated with one proceeding. Punishment is a different matter: each offense carries its own range. Article 102.073(a) cannot be read to alter the applicable punishment. Nevertheless, even assuming that Article 102.073(a) applies, then to preserve appellate review,¹² Appellant must have objected when both fines were imposed in open court because he had the opportunity to do so. F15-50350-V 9 RR 93-94 (sentences imposed not consecutive); *see Burt v. State*, 396 S.W.3d 574, 577 (Tex. Crim. App. 2013) (“A sentencing issue may be preserved by objecting at the punishment hearing, or when the sentence is pronounced.”) (citing *Idowu v. State*, 73 S.W.3d 918, 923 (Tex. Crim. App. 2002)). Appellant did not object. F15-50350-V 9 RR 93-94.

In conclusion, the court of appeals’s striking of the fine in Case No. F15-50350-V violated the general principles applicable to concurrent sentencing under

¹² The lower court reached this issue on its own. Nevertheless, preservation rules apply to unassigned error. *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006) (“errors that are subject to procedural default may not be remedied by the appellate court as unassigned error unless the error was in fact preserved in the trial court.”).

TEX. PENAL CODE § 3.03 and wrongfully deleted part of Appellant’s lawful punishment. When a judgment states that the sentences will run concurrently, it should be understood to include terms of confinement and any fines.¹³ This Court should make clear that the court of appeals erred to delete a lawfully imposed concurrent fine, and expressly disavow any other lower court decisions that have applied the same or similar resolution to prevent any possible double billing.¹⁴

¹³ Once the rule of law is clear, there should be no need for courts to separately specify that the fines are concurrent so that their discharge instructions are clear. *See, e.g., Alexander v. State*, Nos. 03-16-00074-CR & 03-16-00075-CR, 2016 WL 5363735, at *1 (Tex. App. Austin—Sept. 22, 2016, pet ref’d) (not designated for publication) (to avoid the possibility of double billing, the court modified the judgments to specifically state that the fines run concurrently); *Abraham v. State*, Nos. 04-13-00180-CR, 04-13-00181-CR, & 04-13-00182-CR, 2014 WL 2917378, at *2 (Tex. App.—San Antonio June 25, 2014, no pet.) (not designated for publication) (reformed judgments to show that the fines are to run concurrently).

¹⁴ *See, e.g., Aldana v. State*, No. 08-13-00243-CR, 2015 WL 2344023, at *2 (Tex. App.—El Paso May 14, 2015, pet. ref’d) (not designated for publication) (deleted multiple concurrent fines because paying fines concurrently is not an intuitive concept); *Habib v. State*, 431 S.W.3d 737, 742 (Tex. App.—Amarillo 2014, pet. ref’d) (deleting fine from judgment to cure bill-of-cost inaccuracy); *Williams v. State*, 495 S.W.3d 583, 590-91 (Tex. App.—Houston [1st Dist.] 2016, pet. dism’d as improv. granted) (same).

PRAYER FOR RELIEF

The State prays that the Court of Criminal Appeals reverse the lower court by reinstating the fine in Case No. F15-50350-V.

Respectfully submitted,

/s/ Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,185 exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on February 3, 2021, via email or certified electronic service provider to:

Hon. Kimberly Duncan
Kimberly.Duncan@dallascounty.org

Hon. Michael Mowla
michael@mowlalaw.com

/s/ Stacey M. Soule
State Prosecuting Attorney

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Stacey Soule on behalf of Stacey Soule
Bar No. 24031632
information@spa.texas.gov
Envelope ID: 50310492
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Kimberly Duncan		kimberly.duncan@dallascounty.org	2/3/2021 11:30:33 AM	SENT
Michael Mowla		michael@mowlalaw.com	2/3/2021 11:30:33 AM	SENT